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And the Putative Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIC DAVIS, on behalf of himself and all others similarly situated, **Plaintiff,** **vs.** **AT&T, CORP., a corporation** **Defendant.**	CASE NO. '15CV2342 DMS DHB CLASS ACTION COMPLAINT Complaint for Damages and Injunctive Relief Pursuant To The Telephone Consumer Protection Act, 47 U.S.C § 227 *et seq.* *Jury Trial Demanded*

INTRODUCTION

1. Eric Davis ("Plaintiff") brings this class action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant AT&T, CORP., ("Defendant") and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, and/or related entities (collectively "Defendant" or "AT&T"), in negligently, and/or willfully, contacting Plaintiff on Plaintiff's cellular telephone without his prior express consent, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, ("TCPA"). Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

JURISDICTION AND VENUE

2. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff's complaint alleges violations of a federal statute. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one class member belonging to a different state than that of Defendant. Plaintiff seeks up to $1,500.00 (one-thousand-five-hundred dollars) in damages for each call in violation of the TCPA, which, when aggregated among a proposed class numbering in the tens of thousands, or more, exceeds the $5,000,000.00 (five-million dollars) threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA"). Therefore, both the elements of diversity jurisdiction and CAFA jurisdiction are present.

3. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1391(b) and (c) because Defendant is deemed to reside in any judicial district in which they are subject to personal jurisdiction at the time the action is commenced, and because Defendant's contacts with this district are sufficient to subject them to personal jurisdiction. In fact, AT&T has multiple contacts with this forum, and provides its services within this judicial district. Moreover, and on information and belief, Defendant has made the same

calls complained of by Plaintiff within this judicial district, such that some of Defendant's acts in making such calls have occurred within this district.

PARTIES

4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of Texas who resides in San Antonio, Texas.

5. Plaintiff is informed and believed, and thereon alleges, that Defendant is a communications company, and resides, and at all times mentioned herein did reside, in multiple jurisdictions. The California Secretary of State lists AT&T as a New York corporation with its agent for service of process located in New Jersey, but doing business in California since 1950. The Terms of Service for AT&T's website lists Atlanta, Georgia as its office of dispute management. Based upon information and belief AT&T also makes its calls from various call centers throughout the country, including locations in places like Rantoul, Illinois. Regardless of Defendant's various points of contact, Plaintiff alleges that at all times relevant to this Complaint, Defendant conducted business in the State of California and in the County of San Diego, within this judicial district. Defendant provides television, internet, and communications services to the citizens of San Diego, California, including making telephone calls to these individuals in violation of the TCPA.

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (TCPA), 47 U.S.C. § 227

6. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA),[1] in response to a growing number of consumer complaints regarding certain telemarketing practices.

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[1] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

7. The TCPA regulates, among other things, the use of automated telephone equipment, or "autodialers." (Autodialers are also known as an "ATDS".) Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.[2]

8. According to findings by the Federal Communication Commission ("FCC"), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.[3]

9. In short, the TCPA applies to *all calls made to a wireless phone by an autodialer*, whether that call is for telemarketing, informational, or debt collection purposes, *unless the call recipient has given his prior express consent*.[4]

10. On January 4, 2008, the FCC released a Declaratory Ruling clarifying the TCPA with respect to debt collection activities. In that ruling, it confirmed that autodialed and/or prerecorded message calls to a wireless number by a creditor are permitted only if the calls are made with the "prior express consent" of the called party.[5] The FCC "emphasize[d] that prior express consent is deemed to be granted

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[2] 47 U.S.C. § 227(b)(1)(A)(iii).

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

[4] 47 U.S.C. § 227(b)(1)(A)(iii).

[5] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("*FCC Declaratory Ruling*"), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed."[6]

11. In October 2013, the FCC clarified its TCPA rules again, requiring telemarketers to (1) obtain *prior express written* consent from consumers before making a call to a person that would otherwise be in violation of the TCPA, and (2) provide an automated, interactive "opt-out" mechanism during each call so consumers may immediately tell the telemarketer to stop calling.[7]

12. Thus, the pivotal question under the TCPA is whether the call recipient gave his prior express consent to receive calls to his cell phone that would otherwise be in violation of the TCPA. It is Defendant's burden to show that the call recipient gave his *express consent* to receive these calls.[8]

FACTUAL ALLEGATIONS

13. At all times relevant, Plaintiff was a citizen of the State of Texas. Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153 (32).

14. Defendant is, and at all times mentioned herein was, an entity that meets the definition of "person," as defined by 47 U.S.C. § 153 (32).

15. At all times relevant Defendant conducted business in the State of California and in the County of San Diego, within this judicial district.

16. Beginning no later than September of 2014 and continuing through approximately March of 2015, Defendant began calling Plaintiff on his cellular telephone number, ending in "3838". The pre-recorded message said something

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[6] *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

[7] *In re Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6574 (2013)("*Dish Network Ruling*.")

[8] *Grant v. Capital Management Services, L.P.*, 449 Fed.Appx. 598, 600 fn. 1 (9th Cir. 2011).

similar to: "This is AT&T. We are calling because there is a problem with your U-Verse account". Plaintiff believes that these calls were for the purpose of either collecting a debt on the account or telemarketing to the account. However, in either case, Plaintiff was not the account holder of the account.

17. On information and belief, Plaintiff believes that AT&T may have been calling in order to solicit Plaintiff's business, rather than calling Plaintiff as a "mistake". Plaintiff believes that AT&T may employ these "mistaken" calls as a ploy to telemarket to new subscribers in order to sign them up for its U-verse service.

18. Plaintiff did not then, and has never, signed up for AT&T U-Verse service (or any other AT&T service for that matter). Regardless, Plaintiff received approximately 20 pre-recorded message calls from Defendant.

19. Plaintiff has owned his cellular telephone number since approximately 1997. The original contract was with Sprint and later transferred to Verizon. This cellular telephone number has never been serviced by AT&T.

20. Moreover, Plaintiff has never been an AT&T customer of any sort.

21. In total, Plaintiff received approximately 20 calls from AT&T regarding a "U-Verse" service during the September 2014 to March 2015 timeframe. Each and every one of these calls was made to Plaintiff's cellular telephone, without his consent, with a pre-recorded message, and an autodialer.

22. Plaintiff has never provided Defendant with his cellular phone number. Plaintiff did not give Defendant prior express consent to call him for any reason on his cellular telephone with the use of an autodialer and/or prerecorded message, pursuant to 47 U.S.C. § 227(b)(1)(A).

23. On information and belief, Defendant may have obtained Plaintiff's cellular telephone number from a third party, or by "skip tracing" his number. Skip tracing is a common practice corporations use to search for and find unknown contact information.

24. Notwithstanding the fact Plaintiff did not provide Defendant his cellular telephone number at any time, Defendant, or its agents, have called Plaintiff on his cellular telephone via an "automatic telephone dialing system," as defined by 47 U.S.C. § 227(a)(1), and by using "an artificial or prerecorded voice" as prohibited by 47 U.S.C. § 227(b)(1)(A).

25. On information and belief, Plaintiff believes that Defendant utilized an ATDS which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. A predictive dialer, one which can dial from a list of numbers, is also considered an ATDS under the statute.

26. An ATDS often also has the supplemental capability to utilize a pre-recorded message. Because the calls to Plaintiff's cell phone were pre-recorded messages, Plaintiff alleges on information and belief that, logically, they were also made using an ATDS.

27. The telephone number Defendant and/or its agents called is assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).

28. These telephone calls constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

29. These telephone calls by Defendant and/or its agents violated 47 U.S.C. § 227(b)(1).

30. Under the TCPA and pursuant to the FCC's Declaratory Rulings, the burden is on Defendant to demonstrate that Plaintiff provided express consent within the meaning of the statute.

Class Action Allegations

31. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated ("the Class").

32. Plaintiff represents, and is a member of, the Class, consisting of:

> **All persons within the United States who received any telephone call from Defendant or its agents to his or her cellular telephone through the use of any ATDS and/or with an artificial or pre-recorded voice, without their prior express consent, within the four years prior to the filing of the Complaint in this action whose phone number was obtained by skip tracing or through other third parties.**

33. Excluded from the Class are Defendant and any entities in which Defendant has a controlling interest, Defendant's agents and employees, the Judge to whom this action is assigned and any member of the Judge's staff and immediate family, and claims for personal injury, wrongful death, and/or emotional distress.

34. Plaintiff does not know the number of members in the Class, but believes the Class members number in the tens of thousands, if not more. Thus, this matter should be certified as a Class Action to assist in the expeditious litigation of this matter.

35. Plaintiff and members of the Class were harmed by the acts of Defendant in, but not limited to, the following ways: Defendant, either directly or through their agents, illegally contacted Plaintiff and the Class members via their cellular telephones by using an ATDS and/or with a prerecorded voice message, thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid; by having to retrieve or administer messages left by Defendant during those illegal calls; and invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class members were damaged thereby.

36. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of the Class and it expressly is not intended to request any recovery for personal injury. Plaintiff reserves the right to expand the Class definition to seek recovery on behalf of additional persons as facts are learned in further investigation and discovery.

37. The joinder of the Class members is impracticable and the disposition of their claims in the Class action will provide substantial benefits both to the parties and to the court. The disposition of the claims in a Class action will provide substantial benefit to the parties and the Court in avoiding a multiplicity of identical suits. The Class can be identified through Defendant's records or Defendant's agent's records.

38. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. These questions of law and fact predominate over questions that may affect individual Class members, including the following:

A. Whether, within the four years prior to the filing of this Complaint, Defendant and/or their agents made any call (other than a call made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service;

B. Whether Defendant's conduct was knowing and/or willful;

C. Whether Defendant is liable for damages, and the extent of statutory damages for such violation;

D. Whether Defendant should be enjoined from engaging in such conduct in the future;

E. Whether Defendant obtained each Class member's name by skip tracing or called individuals who were not AT&T's clients; AND

F. Whether Defendant obtains phone numbers from third parties.

39. As a person that received numerous calls using an automatic telephone dialing system or an artificial or prerecorded voice, without his prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

40. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law would be allowed to proceed without remedy and Defendant would undoubtedly continue such illegal conduct. Because of the probable amount of the individual Class members' claims, few Class members could afford to seek legal redress for the wrongs complained of herein.

41. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

42. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with federal law. The interest of Class members in individually controlling the prosecution of separate claims against Defendant is small because the maximum statutory damages in an individual action for a violation of the statute are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

43. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 *ET SEQ.*

44. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully stated herein.

45. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

46. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq*, Plaintiff and the Class are entitled to an award of $500.00 in statutory damages for

each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B). Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

47. Plaintiff and Class members are also entitled to an award of attorneys' fees and costs.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 *ET SEQ.*

48. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully stated herein.

49. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

50. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are entitled to treble damages, as provided by statute, up to $1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

51. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

52. Plaintiff and Class members are also entitled to an award of attorneys' fees and costs.

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PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.*

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member $500.00 (five-hundred dollars) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- An award of attorneys' fees and costs to counsel for Plaintiff and the Class.
- An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class.
- Any other relief the Court may deem just and proper.

SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.*

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member treble damages, as provided by statute, up to $1,500.00 (one-thousand-five-hundred dollars) for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- An award of attorneys' fees and costs to counsel for Plaintiff and the Class.
- An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury on all counts so triable.

Date: October 16, 2015

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